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March 23, 2009

Senate Judiciary Committee  
Montana Senate  
P.O. Box 200400  
Helena, MT 59620-0400

Re: HB515

(A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING FOR A HEARING  
UPON OBJECTION TO A DISMISSAL OF AN ABUSE AND  
NEGLECT PETITION; AND AMENDING SECTION 41-3-424, MCA.")

Dear Chairman Perry and Members of the Senate Judiciary Committee:

Thank you for the opportunity for me to submit written testimony in addition to my personal appearance at the hearing scheduled for Tuesday, March 24, 2009.

I am the Vice President of the Board of Directors of CASA (court appointed special advocates) of Montana, Inc. I also serve as the Chair of the Legislative Task Force. The impetus for the proposed amendment to Sec. 41-3-424, M.C.A. was partially as a result of my recent experiences as a CASA volunteer for CASA for Kids in Flathead County.

My professional background includes twenty-two years of the practice of law devoted exclusively to complex matrimonial and custody cases in New York State, as

well as many trials involving abused and/or neglected children. In addition, I served for three years as Deputy Administrator of Matrimonial Matters for New York State. This position involved the management of two offices, one in Buffalo, New York and one in New York City. Chief among my duties was policy making duties for the courts of New York State involving issues relating to children and families.

## **Background**

As a trained CASA volunteer, I was appointed in two separate cases in 2006 by Flathead County District Court Judges. Both of those cases involved abused and/or neglected children. Due to confidentiality constraints, I cannot disclose the specific details of either case. But, in both cases, I was rendered powerless by the law as it exists because the Department of Health and Human Services, Child Protection Services, was able to singlehandedly obtain an Order of Dismissal over my objection and, in my opinion, to the detriment of the children.

In case #1, an infant was removed from the birth mother's home due to her persistent meth addiction and at least two domestic violence incidents against her by the birth father. The infant was placed temporarily with a relative. Before I had the opportunity to meet with the relative, the Department made a decision to dismiss the case and authorize the birth mother to leave Montana with the baby to return to the home of the birth father located in a far southern state. The kinship care relative was the person who told me the baby was gone; that the social worker had met with the mother and relative; had told them that the Department was dismissing the case and that the mother could take the baby out of state. The Motion to Dismiss was filed by the Department, submitted with an Order of Dismissal with no notice to me as the court appointed CASA/GAL for the child.

I appeared in court to object to what had occurred and was advised by the Judge that his hands were tied by the law and that he had no alternative but to grant the Order of Dismissal.

As the CASA, it was my responsibility to file a report with the court to provide details which would assist a discussion as to the best interests of the child. I was unable to fulfill my professional responsibility because I had (and still have) no idea what became of the child.

Within a few weeks, I was appointed in case #2. Children were removed from their father's care for neglect and/or abuse. The children were placed in a foster home which thankfully kept them together. Several years before, the children were removed from the mother's care due to a meth addiction, compounded by extremely poor life choices.

The mother followed her treatment plan and was successful in having the children placed with her while the Department still had temporary legal custody. The father never completed a treatment plan. During the course of the case, disclosures

were made regarding sexual abuse by the father involving one of the girls. Criminal charges were filed and the father was jailed for several months before posting bail. The criminal trial was continued several times and is now scheduled for June 2009. Just a few weeks ago, the County Attorney filed additional charges against the father based upon additional disclosures from the children.

In April 2008, the Department moved for a continuation of temporary legal custody, citing as the primary reason that the criminal trial was pending and the children were possible witnesses and still in need of services. The motion was unopposed and granted by the court. *Two weeks later, the Department filed a Motion to Dismiss.* The court granted the motion citing the current law as being dispositive of the issue. My appointment as the children's CASA/GAL ended with the Order of Dismissal.

One month ago, these children were removed from the mother's care and put into different foster homes. I have been reappointed as their CASA/GAL. If the law had permitted the court to consider my objection to the dismissal motion, who is to say the children's situation would not have deteriorated?

The children are back in the system, and have been further traumatized and emotionally damaged. Since the children were removed one month ago, they have displayed significant problems with education, depression, suicide threats, personality changes and insecurity.

### **Rationale for Supporting HB 515**

The discussion for the proposed legislative change centered on amending the statute to specifically authorize the court to exercise judicial oversight and approval of any motion to dismiss in abuse/neglect cases. The issue is that the statute, as presently written, permits the Department to file a motion to dismiss without any meaningful or significant input from the court or other parties, including CASA/GALs. The statutory language states "...the court ***shall*** dismiss..." (Emphasis added) 41-3-424, M.C.A.

The rationale for the amendment is as follows: the statutory scheme permits, as it should, the Department to make applications, often *ex parte*, for drastic interim relief such as the removal of children from their homes and subsequent foster care placement. Once the interim order is granted, the powerful wheels of the Department and the laws of the state start turning, hopefully to the benefit of the abused/neglected children and for their protection. Service providers become involved, visitation most often becomes supervised, or may not even be permitted, children are placed in foster homes with significant disruption to the children's lives, children often are required to change schools and leave their friends, CASA/GALs are appointed, attorneys are appointed for the children and the parents and the County Attorney has another case to prosecute.

When the Department, which is almost always the moving party, files a motion to

dismiss, most courts will grant the order notwithstanding objections from the other parties, especially CASA/GALs.

The point of the proposed amendment is simply to even the playing field when the court is faced with a motion to dismiss in an abuse/neglect case. The present statutory scheme in the child welfare arena gives broad emergency powers, often drastic in nature, but necessary at that point in time, to the Department at the front end to protect children.

The argument is that the court, having been involved throughout the case, must have the right and obligation to make a reasoned decision as to whether a dismissal is warranted and is in the best interest of the children. Without this specific statutory directive, the Department becomes judge and jury, and sometimes, executioner.

More simply put, one party to child neglect/abuse litigation should not be able to suddenly and without court discretion end the case, over objection, when so much hangs in the balance for vulnerable children. It is a basic tenet of law that when children are parties to litigation, the court has a very special and serious obligation as *parens patriae* to be the ultimate protector of these very vulnerable children who have little or no voice. (In the United States, the *parens patriae* doctrine has had its greatest application in the treatment of children, mentally ill persons, and other individuals who are legally incompetent to manage their affairs. The state is the supreme guardian of all children within its jurisdiction, and state courts have the inherent power to intervene to protect the best interests of children whose welfare is jeopardized by controversies between parents. This inherent power is generally supplemented by legislative acts that define the scope of child protection in a state.) *The Legal Dictionary, FreeDictionary.com*

While it was determined during the Task Force's work that Montana courts did not uniformly view and interpret the statute in the same way, there was sufficient anecdotal evidence and support from members of the judiciary, certain deputy county attorneys, CASAs and GALs, attorneys for children, CASA program directors, members of Advisory Councils to CASA programs and others who supported the proposed amendment.

### **Conclusion**

The proposed amendment does not alter the statutory criteria for a motion to dismiss. What it does accomplish is the provision of a mechanism which would permit the court, upon objection of one of the parties (including a CASA), to take a considered look at the objection and determine if a dismissal is in order and in the best interests of the children. The determination of what constitutes the best interests of the children does not belong to the prosecutor as part of prosecutorial discretion, or to the attorneys for the parents, or to the CASA/GALs. This determination belongs solely to the court.

As presently written, the dismissal statute, 41-3-424, M.C.A, precludes the court from carrying out a very sacred obligation and duty which is non-delegable.

The lives of abused and/or neglected children must be accorded the same judicial scrutiny when the Department seeks to dismiss a case as is accorded the matter when the case is started.

Please approve HB 515 for the benefit of these vulnerable children.

Thank you for your consideration of my comments.

Respectfully submitted,

Joyce E. Funda